No. 85-495



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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**Ansonia Board of Education, et al.,**
**Petitioners,**

**v.**

**Ronald Philbrook, et al.,**
**Respondents.**

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT IN SUPPORT OF RESPONDENT PHILBROOK

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## INTEREST OF AMICUS CURIAE

This brief is submitted by the State of Connecticut as amicus curiae in support of the position of respondent Ronald Philbrook. This brief is

submitted in accordance with Supreme Court Rule 36.4.

The State of Connecticut has prohibited discrimination, inter alia, on the basis of religious creed.[1/] In addition, the State of Connecticut's definition of discrimination on the basis of religious creed[2/] mirrors the definition

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1/ (a) It shall be a discriminatory practice in violation of this section:

(1) For an employer ... to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individuals race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability....

Conn. Gen. Stat. § 46a-60 (emphasis added).

2/ "Discrimination on the basis of religious creed" includes but is not

(footnote cont'd)

in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (hereinafter "Title VII"). These state statutory provisions provide protection very similar to the protection provided in Title VII. The State of Connecticut agency charged with the duty of enforcing this state statute is the Commission on Human Rights and Opportunities (hereinafter "CHRO"). The

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> limited to discrimination related to all aspects of religious observances and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without under hardship on the conduct of the employer's business.

Conn. Gen. Stat. § 46a-51(18) (emphasis added).

CHRO is also an agency that cooperates with the Equal Employment Opportunity Commission pursuant to the provisions of 42 U.S.C. §§ 2000e-5(c) - 2000e-5(e), 2000e-8(b). As such an agency, the CHRO also investigates alleged violations of Title VII occurring within the State of Connecticut.

In addition, during the Court's October 1984 term, the Attorney General of the State of Connecticut, intervened in a case, Estate of Thornton v. Caldor, Inc., ___ U.S. ___, 105 S.Ct. 2914 (1985). The difference between an absolute requirement to accommodate religion and a requirement that an employer make a reasonable accommodation, such as the requirement of Title VII, was addressed in a concurring opinion in Thornton.

105 S.Ct. at 2918 (O'Connor, J., concurring). Legal issues that are present in this case flow directly from legal issues that were addressed by Justice O'Connor in her concurrence in Thornton. Thus the State of Connecticut has a substantial interest in the proper resolution of the questions presented in this case.

## SUMMARY OF ARGUMENT

A prima facie case of religious discrimination under Title VII is established by showing three factors. These are: (1) that the plaintiff has a bona fide religious belief that conflicts with an employment requirement; (2) that the plaintiff has informed the employer of this belief; and (3) that the

plaintiff was disciplined for failing to comply with this requirement. In this case, the Court of Appeals correctly concluded that the plaintiff established a prima facie case.

In this case, where the employer has suggested an accommodation which did not resolve the employee's claim of religious discrimination, the employee must be permitted to suggest further reasonable accommodations. These proposals must be accepted by the employer, provided the accommodations do not cause undue hardship to the employer. Such a rule allows the workplace to be open to all religious faiths and allows the employee to participate in the conciliation process envisioned by Title VII, without burdening an employer.

## ARGUMENT

### I.

### THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PLAINTIFF ESTABLISHED A PRIMA FACIE CASE

### A.

### A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION REQUIRES ONLY A SHOWING THAT THE PLAINTIFF HAS A BONA FIDE RELIGIOUS BELIEF WHICH CONFLICTS WITH AN EMPLOYMENT REQUIREMENT, THAT THE PLAINTIFF INFORMED THE EMPLOYER OF THIS BELIEF, AND THAT THE PLAINTIFF WAS DISCIPLINED FOR FAILURE TO COMPLY WITH THE CONFLICTING EMPLOYMENT REQUIREMENT

The initial question in this case is the question of what constitutes a prima facie case of religious discrimination under Title VII. For the reasons discussed infra, this Court should conclude that a prima facie case is

established where there is a bona fide religious belief conflicting with an employment requirement, the employee has informed the employer of this belief, and the employee was disciplined for failing to comply with the employment requirement.[3/] This is the standard

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3/ Courts of Appeal are in agreement that two elements of the prima facie case are the showing of a bona fide religious belief conflicting with an employment requirement and the showing that the plaintiff informed the employer of this belief. However, they take different approaches with respect to the third element of the prima facie case. Some Courts of Appeal have stated that an employee must show that he was disciplined for failing to comply with the employment requirement. Philbrook v. Ansonia Bd. of Ed., 757 F.2d 476, 481 (2d Cir. 1985), cert. granted, ___ U.S. ___, 106 S.Ct. 848 (1986); Turpen v. Missouri - Kansas - Texas Railroad Co., 736 F.2d 1022, 1026 (5th Cir. 1984). Other Courts of

(footnote cont'd)

that was applied by the United States Court of Appeals for the Second Circuit in this case. Philbrook v. Ansonia Bd. of Ed., 757 F.2d 476, 481 (2d Cir. 1985).[4/]

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appeal have stated that an employee must show that he was discharged for failing to comply with the employment requirement. Brener v. Diagnostic Center Hospital, 671 F.2d 141, 144, (5th Cir. 1982); Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979); Anderson v. General Dynamics Convair, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); see also, E.E.O.C. v. Caribe Hilton, 597 F.Supp. 1007, 1010 (D. P.R. 1984). One court has indicated that an employee need only be threatened with discharge. Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979).

4/ We also note that one Court of Appeals, in addressing the merits of a case that did not involve a dis-

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There are a variety of approaches taken by different courts. Whatever approaches have been used have not, until this case, considered whether something less than a discharge, or threat of a discharge, is sufficient to make out a prima facie case of religious discrimination. In each of the cases referred

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> charge, concluded that the plaintiff failed to establish the element of a prima facie case requiring a showing that a religious belief conflicted with an employment requirement. The Court of Appeals for the Tenth Circuit noted that "[d]efendant's policy and practices jeopardized neither Pinsker's job nor his observation of religious holidays." Pinsker v. Joint Dist. No. 28J of Adams and Arapahoe, 735 F.2d 388, 391 (10th Cir. 1984). This is entirely different from the instant case where Ronald Philbrook's religious obligations clearly conflicted with the policy of his employer.

to in n.3, at pp. 8 - 9, supra, other than the instant case, the case developed out of a discharge, or threat of a discharge. In these cases, the courts did not have to look any further than the discharge to reach the conclusion that a prima facie case was established. On the other hand, in the case at bar, the plaintiff was not discharged nor was he threatened with discharge. Thus, it was necessary for the Second Circuit to examine whether something less than a discharge would suffice to establish a prima facie case.

As argued infra, this Court should conclude that the adverse impact of the Ansonia Board of Education's policy on the compensation, terms, conditions and privileges of Ronald Philbrook's

employment is enough to establish this element of the prima facie case. This conclusion is supported by the clear language of Title VII and by the approach taken under Title VII with respect to racial discrimination and sex discrimination.

1. The Clear Language of Title VII Extends to Terms and Conditions of Employment as Well as Discharges

The proper starting point for examining the intent of Title VII is the text of Title VII itself. Indeed, Title VII clearly provides:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condi-

> tions or privileges of employment because of such individual's race, color, religion, sex or national origin....

42 U.S.C. § 2000e-2(a) (emphasis added).

Clearly, Congress contemplated that Title VII was intended to cover more than just a discharge. This Court has recognized that it is its duty "to give effect, if possible, to every clause and word of a statute." United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Inhabitants of Montclair Tp. v. Ramsdell, 107 U.S. 147, 152 (1883)). Were the Court to interpret Title VII as applying only to discharges, the language regarding discrimination with respect to compensation, terms, conditions or privileges of employment would be without meaning.

This Court has noted that there is significance to the language in Title VII regarding compensation, terms, conditions or privileges of employment. Benefits comprising the incidents of employment or forming "'an aspect of the relationship between the employer and employees,' [citation omitted], may not be afforded in a manner contrary to Title VII." Hishon v. King & Spalding, ___ U.S. ___, 104 S.Ct. 2229, 2234 (1984).

By including language in Title VII regarding terms, conditions, and privileges of employment, Congress expressed a very clear desire to reach employment discrimination other than discharges. This approach to employment discrimination has been recognized by courts in

the areas of race discrimination and sex discrimination.

2. Just as Cases of Race or Sex Discrimination Are Not Limited to Discharges, Cases of Religious Discrimination Should Not Be Limited to Discharges

Courts that have addressed questions of the breadth of Title VII have also concluded that it reaches beyond discharges alone. The language of Title VII at 42 U.S.C. § 2000e-2(a)(1):

> [E]vinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it chose the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of

> tomorrow.... [T]oday employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971).

Discrimination that may be redressed by using Title VII, as the Hishon decision directs, is not limited to discharges. Hishon v. King & Spalding, ___ U.S. at ___, 104 S.Ct. at 2234. A discharge is not needed in order to state a prima facie case under Title VII. An infringement of Title VII is not "necessarily dependent upon the victim's loss of employment or promotion." Vinson v. Taylor, 753 F.2d 141, 144 (D.C. Cir. 1985), reh'g denied, 760 F.2d 1330 (1985), cert. granted, ___

U.S. ___, 106 S.Ct. 57 (1985). A discriminatory work environment is enough, "regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." Bundy v. Jackson, 641 F.2d 934, 943-944 (D.C. Cir. 1981). Indeed, "sexually stereotyped insults and demeaning propositions" create a work atmosphere that may violate Title VII. Bundy, 641 F.2d at 944; Vinson, 753 F.2d at 145-146.

Likewise, a dress code that requires women to wear prescribed uniforms but does not impose a requirement that men wear uniforms, violates Title VII. Carroll v. Talman Federal S. & L. Ass'n of Chicago, 604 F.2d 1028, 1030 (7th

Cir. 1979). This too is discrimination less onerous than a discharge that is covered by Title VII.

These courts properly recognize that Congress did not intend Title VII to be limited only to discharges. In the areas of race discrimination and sex discrimination Title VII encompasses all discrimination affecting terms, conditions, and privileges of employment. No principled distinction exists for employing a different standard when evaluating religious discrimination.

In 42 U.S.C. § 2000e-2(a), Congress included religion along with race and sex as prohibited bases of discrimination in the workplace. Thus, religious discrimination affecting terms, conditions, and privileges of employment

should be treated in the same fashion as race discrimination and sex discrimination. Congress intended Title VII to include terms, conditions, and privileges of employment, as well as discharges. Since the plaintiff established that the terms and conditions of his employment interfered with bona fide religious beliefs of which he had informed his employer, the Court should conclude that he properly established a prima facie case of religious discrimination.

B.

IN THIS CASE THE PLAINTIFF ESTABLISHED ALL OF THE ELEMENTS OF A PRIMA FACIE CASE

1. The Plaintiff Had a Bona Fide Religious Belief Which Conflicted With an Employment Requirement

In this case, the plaintiff did have a bona fide[5/] religious belief that conflicted with an employment requirement. The plaintiff had a religious belief that required him to refrain from secular employment on holy days. Several of these holy days would fall during

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5/ The Court of Appeals noted that a finding of insincerity of the plaintiff's religious belief would be clearly erroneous based on the record of the proceedings before the District Court. Indeed, even though the District Court decided against the plaintiff, it expressly declined to find insincerity of the plaintiff's religious beliefs. Philbrook, 757 F.2d at 481.

the school year. In order for the plaintiff to give effect to his religious beliefs by observing his religious holidays, he would have to miss approximately six school days per year. Philbrook v. Ansonia Bd. of Ed., 757 F.2d 476, 478 (2d Cir. 1985), cert. granted, ___ U.S. ___, 106 S.Ct. 848 (1986). The plaintiff's salary would be docked for missing some of these school days. Philbrook, 757 F.2d at 479.[6/]

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6/ This demonstrates the conflict between the plaintiff's religious belief and an employment practice. In order to give effect to his religious belief, the plaintiff is put in a position where he faces a reduction in income. However, we note that while this is sufficient for establishing one element of the prima facie case, the prima facie case alone is not sufficient to establish a breach of Title VII in a case, like this, where the issues

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The plaintiff demonstrated a religious belief conflicting with an employment requirement. By showing this religious belief, refraining from secular employment on holy days falling during the school year, the plaintiff satisfied this element of the prima facie case.

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are contested. Rather, once the prima facie case has been established, the judicial inquiry moves forward in order to focus upon the reasonableness of proposed accomodations, and any undue hardship to the employer. This further judicial inquiry is fully discussed in part II of this brief, at pp. 26 - 41, infra.

2. The Plaintiff Informed His Employer of this Belief

The Court of Appeals noted that the plaintiff's unrebutted testimony demonstrated that he had informed both his employer and union of the conflict between his religious belief and employment requirements. Philbrook, 757 F.2d at 482.[7/] Thus, this element of the prima facie case was also established. Philbrook, 757 F.2d at 482.

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7/ The Court of Appeals remanded this case, not for another finding as to whether or not the plaintiff provided notice of this belief. Rather, the purpose of the remand, as to this issue, was only to clarify, if necessary, the point in time when the notice was provided for the purpose of ascertaining what damages were proper. Philbrook, 757 F.2d at 482.

3. The Plaintiff Was Disciplined For Failing to Comply With the Employment Requirement

Finally, it is clear that the plaintiff was disciplined for failing to comply with the employment requirement. The plaintiff's terms and conditions of employment were affected in that, even under the proposal of the employer, the plaintiff's salary would be docked substantially.[8/] Such action by the employer having an adverse effect on the terms and conditions of the plaintiff's employment is sufficient to establish this element of the prima facie case under Title VII.

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8/ In 1984, the plaintiff's salary would be docked $130 for each day that he was absent without authorization. This is the case even though a substitute teacher would only have cost the employer $30 per day. Philbrook, 757 F.2d at 480 n.3.

For all of the reasons articulated above, the plaintiff established a prima facie case of religious discrimination under Title VII. Of course, the prima facie case alone does not entitle the plaintiff to prevail where the defendants contested the claim. Rather, upon finding a prima facie violation, the burden shifts to the employer to demonstrate that it would be an undue hardship for the employer to reasonably accommodate the employee's religious obligations. As argued at pp. 26 - 41, infra, the petitioner board of education is obliged to accept reasonable suggestions of respondent Philbrook, provided they do not cause undue hardship.

II.

**THE SCHOOL BOARD IS OBLIGED TO ACCEPT THE REASONABLE SUGGESTIONS OF ITS EMPLOYEE, PROVIDED THEY DO NOT CAUSE UNDUE HARDSHIP**

The second issue raised by the School Board is whether Title VII[9/] requires the School Board to adopt the reasonable accommodation suggestions of its employee-teacher, should these prove on remand to cause no undue hardship to the Board.[10/] Your amicus contends that

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9/ Respondent may well be entitled to relief under the Free Exercise clause. See Thomas v. Review Board, 450 U.S. 707, 717 (1981) ("Here as in Sherbert, the employee was put to a choice between fidelity to religious belief or cessation of work..."). The Second Circuit left this issue for the District Court on remand. Philbrook, 757 F.2d at 487, 488 n.12.

10/ This Court should not reach the issue of whether undue hardship, as

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the Board must defer to the employee's non-burdensome suggestions.

As Justice O'Connor pointed out last term:

> I do not read the Court's opinion [in this case] as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act are similarly invalid. These provisions preclude employment discrimination based on a person's religion and require private employers to reasonably accommodate the religious practices of employees

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> raised on pages 25-31 of Petitioners' brief, exists. This is a factual matter for the District Court. Further, the issue improperly raises matters not within the scope of the questions presented in tne Petition for Certiorari. Stone v. Powell, 428 U.S. 465, 480 n.15 (1976). The only issue raised in the petition is whether the employer must accept the suggestions of the employee that do not pose any undue hardship. Petition for Certiorari, p. i.

> unless to do so would cause undue hardship to the employer's business.

Estate of Thornton v. Caldor, Inc., ___ U.S. ___, 105 S.Ct. 2914, 2919 (1985) (emphasis added).[11/] Such deference to the employee "has the valid secular

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11/ Justice O'Connor's interpretation of Title VII parallel's the express words of the section in question:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j)(emphasis added); see also, discussion of EEOC guidelines, at pp. 40 - 41, infra.

purpose of assuring employment opportunity to all groups in our pluralistic society." Estate of Thornton v. Caldor, Inc., ___ U.S. ___, 105 S.Ct. at 2919.

At the outset we emphasize that Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), does not resolve the present controversy. There, the employee's suggestions were specifically found to be unduly burdensome by the District Court. 432 U.S. at 83 n.14. In Hardison, acceding to the employee's suggestions would have violated the seniority provisions of the collective bargaining agreement. Therefore, the Court concluded that the employer had made a reasonable effort to accommodate the employee's religious belief.

This case is unlike Hardison. The employer here relies on an accommodation drawn from the collective bargaining agreement. The employee suggests two alternatives that more adequately accommodate his religious needs. Factually the employer suggests that a policy of three days of paid leave and three days of unpaid leave satisfies its duty. Philbrook has counteroffered with two alternatives: 1) to allow him to use personal business leave for religious holy days, or 2) to allow him to receive his salary, less the cost of a substitute teacher, with whom he would spend extra work time.

The Second Circuit, having found a prima facie case, has appropriately remanded the matter to the District Court

to determine if Philbrook's suggestions pose an undue hardship. Philbrook, 757 F.2d at 485. This Court should conclude that the Second Circuit was correct in declaring that the employer must accept the further suggestions of its employee which resolve the dispute between them where the reasonable suggestions do not cause "undue hardship."

Both the Fifth and the Ninth Circuits have analyzed the concurrent duties of the employer and employee to obviate religious discrimination. In Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1981), the employer offered a Sabbatarian employee flexible hours and the possibility of swapping amongst staff to satisfy the employee's Saturday work schedule

problem. Even though the Court of Appeals rejected the employee's objection to the employer's accommodations, 671 F.2d at 145, in fact the Court of Appeals considered whether the "further measures [suggested by the employee] to accommodate him outside the pharmacy's scheduling system would result in 'undue hardship' to the hospital and its employees." 671 F.2d at 146. The Court of Appeals affirmed the District Court's conclusion that the employee's additional suggestions were an undue hardship. 671 F.2d at 146; see also Turpen v. Missouri-Kansas-Texas R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984) (factual decisions of "reasonable accommodation" and "undue hardship" are interlocking).

The Ninth Circuit has more extensively considered this issue. In Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979), the employee, discharged for refusal to pay union dues, established a prima facie case of religious discrimination. The Court of Appeals declared:

> The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship.

Anderson, 589 F.2d at 401.

The companion case, Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979), states the rule even more expressly:

Once the employer has made more than a negligible effort to accommodate the employee (Trans World Airlines v. Hardison, supra, 432 U.S. at 77, 97 S.Ct. 2264) and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship." Once again, this term is not defined by the Civil Rights Act, but the burden of proving undue hardship rests upon the employer or union. The Hardison Court found that the employer had demonstrated undue hardship where the accommodation requested by the employee (a four-day work week) would have effectively required preferential treatment on the basis of religion for Sabbatarians, causing sacrifices or dislocation in the work schedules of fellow-workers or requiring the employer to hire outsiders to work Saturday shifts at "premium wages." (Id. at 81-84, 97 S.Ct. 2264) The Court held that where the impacts upon co-workers or costs are greater than de minimis, undue hardship is demonstrated. (Id. at 84, 97 S.Ct. 2264)

Burns, 589 F.2d at 406 (emphasis added). The Burns Court held that the employer and the union had failed to demonstrate undue hardship in accommodating the employee's request to pay an amount equivalent to his union dues to charity.

The recent case of American Postal Workers Union v. Postmaster General, 781 F.2d 772 (9th Cir. 1986)[12/] complements the Anderson - Burns rule. There, the Postal Service's proposal "effectively eliminated the religious conflict visited upon the affected employees." 781

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12/ In American Postal Workers window clerks objected to accepting draft registration materials. The Post Office management offered to transfer the clerks to non-window positions. The clerks objected to the transfers because of the secular reason that the window positions have a better employment status.

F.2d at 776. The employees' objections to the employer's attempted accommodation were based upon entirely "secular grounds." 781 F.2d at 776.[13/] The employer was then allowed to prove that its accommodation preserved "the affected employee's employment status" in lieu of proving that the employee's suggestions constituted undue hardship. 781 F.2d at 776 - 777; see also Yott v. North American Rockwell Corp., 602 F.2d

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13/ Had the employees' objections not been based on secular grounds, but religious grounds, Burns would apply. "If the accommodation proposed by the employer fails to eliminate the employee's religious conflict, the employer must implement an alternative accommodation proposed by the employee, unless implementation of that accommodation would cause 'undue hardship' to the employer." American Postal Workers, 781 F.2d at 776 (emphasis added).

904, 907-908 (9th Cir. 1979) ("good faith effort to accommodate" made by employer).

Clearly, this case parallels Burns. As in Burns, the Ansonia School Board "made no effort to accommodate [the employee's] particular religious beliefs. In effect, they informed [the employee] that his only alternative was to accept the terms of the existing contract...." Burns, 589 F.2d at 406. The suggestion of the School Board that Philbrook take three unpaid leave days hardly "eliminated the religious conflict." American Postal Workers, 781 F.2d at 776. As the Second Circuit found, "[t]he school board's leave policy forced [Philbrook] to act in a way inconsistent with his religious belief." Philbrook, 757 F.2d

at 482. Since the employee viewed the employer's suggested accommodation as inadequate, the Second Circuit appropriately remanded the case to the District Court to analyze the further suggestions of the employee.

Affirming the decision of the Second Circuit makes good sense. Except in those circumstances where the employer can prove that he has completely eliminated the religious dispute, the employee should be permitted to offer other accommodations which cause no undue hardship.[14/]

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14/ Of course, the employer who acts in good faith to resolve the matter should not be held hostage to an employee who objects to an employer's suggestion solely for secular reasons, even though an employer's proposal completely resolves the religious controversy and does not in any other way disadvantage the employee's job status.

As the Fifth Circuit's opinion in Brener, in commenting on the duty of the employee to cooperate with an employer's efforts to accommodate, states:

> [T]he statute's use of the term 'reasonable' suggests: bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and exigencies of the employer's business.

Brener, 671 F.2d at 145-146.

By authorizing employee input in the nature of the accommodation to be made without imposing an undue burden on the employer, the Second Circuit's decision commands just that "bilateral cooperation".

Finally, it is important to note that the Equal Employment Opportunity Commission has approved a regulation paralleling the holding of the Second Circuit:

> When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:
>
> (i) The alternatives for accommodation considered by the employer or labor organization; and
>
> (ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, <u>when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities</u>.

29 C.F.R. § 1605.2(c)(2) (emphasis added).

This administrative interpretation is entitled to "great deference". Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979); E.E.O.C. v. Shell Oil Co., 104 S.Ct. 1621, 1636 n.36 (1984). The EEOC regulation supports the Second Circuit's requirement that under Title VII the employee's suggestions, which do not pose for the employer an undue hardship, are required to be accepted by the employer.

## CONCLUSION

For all of the reasons set forth in this brief, the Court should conclude that the United States Court of Appeals for the Second Circuit correctly decided

this case. Accordingly, the State of Connecticut, as amicus curiae, requests that the decision of the United States Court of Appeals for the Second Circuit be affirmed.

RESPECTFULLY SUBMITTED,

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